Supreme Court, U.S.
FILED

No. _____ 091266 APR 16 2010

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In The

Supreme Court of the United States

GEORGE DELALIO,

Petitioner,

vs.

STATE OF WYOMING,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the one year statute of limitations in 28 U.S.C. § 2244(d)(1) is equitably tolled due to the gross negligence and culpable neglect of George DeLalio's trial lawyer and because of the actual innocence of Dr. DeLalio.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Statement of Jurisdiction	1
Statutes	1
Statement of the Case	2
Reasons for Granting the Writ	4
Argument	5
Conclusion	18

TABLE OF ATTACHMENTS IN APPENDIX

Tenth Circuit Order Denying Certificate of Appealability, entered 1/29/10 ..... App. 1

District Court Order Denying Petition for Writ of Habeas Corpus ..... App. 8

TABLE OF AUTHORITIES

Page

CASES:

Fisher v. Gibson, 262 F.3d 1135 (10th Cir. 2001) ...15, 16

Gibson v. Klinger, 232 F.3d 799 (10th Cir. 2000)....14, 15

Holland v. Florida, Supreme Court No. 09-5327 ...5, 18

McLuckie v. Abbott, 337 F.3d 1193 (10th Cir. 2003) 14

Miller v. Marr, 141 F.3d 976 (10th Cir. 1998) 15

Schlup v. Delo, 513 U.S. 298 (1995) 15

Strickland v. Washington, 466 U.S. 668 (1984) 13, 15

STATUTES:

FEDERAL:

28 U.S.C. § 1254 1

28 U.S.C. § 1291 4

28 U.S.C. § 2244 .....1, 3, 5, 10, 12

28 U.S.C. § 2253 4

28 U.S.C. § 2254 14

STATE:

W.S. § 6-1-301 2

W.S. § 6-4-303 2

W.S. § 7-11-301.....12

W.S. § 7-11-304.....1, 12, 13

W.S. § 7-14-103 3

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

6th Amendment to the United States Constitution 13

OPINION BELOW

The Order Denying Certificate of Appealability of the Tenth Circuit Court of Appeals from which review is sought is unpublished. A copy of the opinion is attached hereto in the Appendix.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254 which provides for review of cases in the courts of appeals by writ of certiorari after rendition of judgment. The Order Denying Certificate of Appealability of the Tenth Circuit Court of Appeals was entered on January 29, 2010.

STATUTES

State statute: W.S. § 7-11-304 states that "A person is not responsible for criminal conduct if at the time of the criminal conduct, as a result of mental illness or deficiency, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

Federal statute: 28 U.S.C. § 2244(d)(1)(D), provides that

> A 1-year period of limitations shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall

> run from . . . the date on which the factual predicate of the claim or claims presented could have been discoverable through the exercise of due diligence.

STATEMENT OF CASE

George DeLalio, a physician by trade, was charged October 21, 2005 by Felony Information in the Circuit Court of the First Judicial District, Laramie County, Wyoming with one count of attempted sexual exploitation of children, in violation of W.S. §§ 6-1-301 & 6-4-303(b)(ii), 2003 Lexis. He was alleged to have unlawfully attempted "to cause, induce, entice a person, whom he believed to be a thirteen year old child, to engage in explicit sexual contact." Dr. DeLalio retained Thomas L. Lee for his representation.

Dr. DeLalio pled "not guilty" to the crime charged in District Court. Ultimately, he pled "guilty" to the charge on February 2, 2006. Dr. DeLalio was sentenced on October 5, 2006, by order entered October 13, 2006, to the Wyoming State Penitentiary for not less than two nor more than four years. The execution of the confinement imposed was suspended, and Dr. DeLalio was placed on probation for five years on terms and conditions.

Dr. DeLalio is presently on probation.

On April 18, 2008, Dr. DeLalio filed a timely Petition for Post-conviction Relief in the First Judicial District, Laramie County, Wyoming.[1] Respondent State of Wyoming filed a motion for summary judgment on August 8, 2008. Dr. DeLalio filed a response to the motion for summary judgment on August 28, 2008, together with affidavits. The District Court granted the State of Wyoming's motion for summary judgment on January 12, 2008.

Dr. DeLalio filed a timely Petition for Writ of Review in the Wyoming Supreme Court, No. S-09-0019, on January 26, 2009. A Petition for Writ of Review is a discretionary writ, akin to a petition for writ of certiorari. The Petition for Writ of Review was denied by the Wyoming Supreme Court on February 24, 2009, without opinion.

On March 16, 2009, Dr. DeLalio filed his Petition for Writ of Habeas Corpus in the United States District Court for the District of Wyoming. The State of Wyoming alleged that the petition is barred, based upon the one year period of limitation in 28 U.S.C. § 2244(d)(1). Dr. DeLalio, in response, stated that his case is governed by the provisions of 28 U.S.C. § 2244(d)(1)(D) which provides that "The limitation period shall run from the . . . the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of

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[1] In Wyoming, a petition for post-conviction relief can be filed within five years of the conviction. W.S. § 7-14-103(d).

due diligence." Dr. DeLalio also alleged that he is actually innocent of the crime charged in state court. He filed an affidavit along with his response. Appendix to Brief on Appeal in the Tenth Circuit 4.

The order denying petition for writ of habeas corpus and the judgment were entered by the U.S. District Court on October 21, 2009. Dr. DeLalio filed his notice of appeal on November 10, 2009. The district court entered its Order Denying Certificate Of Appealability on November 18, 2009.

The jurisdiction of the Tenth Circuit Court of Appeals is based upon 28 U.S.C.A. §§ 1291 and 2253. After Dr. DeLalio filed his brief concerning the certificate of appealability and on the merits, the Tenth Circuit entered an Order Denying Certificate of Appealability on January 29, 2010.

REASONS FOR GRANTING THE WRIT

George DeLalio was mentally deficient and brain damaged, and, therefore, he was completely reliant on his trial counsel to raise all available defenses to the charges. The failure of trial counsel to investigate or raise a mental health defense in the case deprived George DeLalio of the only defense available to him. The failure of trial counsel to raise an absolute defense is tantamount to a complete abandonment of his client. As a consequence of the gross negligence and culpable neglect of counsel, George DeLalio pled guilty to the charges and was entirely unaware of

the one year statute of limitations in 28 U.S.C. § 2244(d)(1). When he was finally advised that a defense existed, the one year statute of limitations had already run. Therefore, the one year statute of limitations should be equitably tolled.

In the alternative this case likely will be affected by the U.S. Supreme Court's pending decision in *Holland v. Florida,* Case No. 09-5327, and George DeLalio's petition should be held in abeyance until *Holland v. Florida* is decided. The question presented in *Holland v. Florida* is "whether 'gross negligence' by collateral counsel, which directly results in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling. . . ."

It is the position of Dr. DeLalio that trial counsel was guilty of gross negligence and culpable neglect in this case; he was abandoned by trial counsel; and the gross negligence and culpable neglect of trial counsel "directly result[ed] in the late filing of a petition for writ of habeas corpus."

ARGUMENT

The case against Dr. George DeLalio arises from a law enforcement internet sting. A Wyoming law enforcement officer posing as a 13 year old girl arranged to meet Dr. DeLalio in Cheyenne, Wyoming. When Dr. DeLalio allegedly travelled to Wyoming from Colorado for sexual purposes he was arrested

and charged with attempted sexual exploitation of a minor.

George DeLalio has a Bachelor of Science degree in nursing and a Doctorate in Chiropractic. Dr. DeLalio operated a successful chiropractic practice for many years. It is uncontroverted that Dr. DeLalio suffered a head injury in Maine several years before the incident which resulted in his criminal prosecution. There is also no question that the head injury forced him to close his practice because of cognitive deficits he experienced as a consequence of the concussion. Obviously, Dr. DeLalio generated a substantial volume of medical records relating to the head injury. The injury resulted in civil litigation, which was ultimately settled to the benefit of Dr. DeLalio.

Dr. DeLalio had no criminal record prior to his arrest in this case.

It is also uncontroverted that Dr. DeLalio informed his trial attorney at the very beginning of this case that he had suffered a concussion. In the words of Dr. DeLalio, "I specifically brought up my bout with the residual effects of my concussion. I also asked him [Tom Lee] if these symptoms could have contributed to my actions, which were so uncharacteristic. He flatly said no and that they would not be considered by the court." Appendix to Brief on Appeal in the Tenth Circuit 7.

Dr. DeLalio continued to raise the issue concerning his head injury throughout the case. As he stated in paragraph 20 of his affidavit in state court,

"Numerous times thereafter I brought up my concussion as a mitigating factor and was told that it did not figure into my case." Appendix to Brief on Appeal in the Tenth Circuit 10.

Despite the fact that Dr. DeLalio's intent was clearly an issue in his case and intent is a mental state defense, attorney Tom Lee totally ignored Dr. DeLalio's organic brain syndrome and did not do any investigation whatsoever. He did not gather the medical records, which included a neuropsychological evaluation which evidenced Dr. DeLalio's cognitive impairments. Mr. Lee did not obtain the records, which included physician's depositions, of the prior civil action which was based on Dr. DeLalio's head injury. The attorney not only failed to do a reasonable investigation into Dr. DeLalio's medical and legal history, he failed to have Dr. DeLalio evaluated by a qualified neuropsychologist or neurologist to determine whether or not Dr. DeLalio had a viable defense to this case based upon his cognitive deficits.

Dr. DeLalio's counsel on state post-conviction gathered the medical and legal records. Moreover, Dr. DeLalio was examined by Dr. Craig Beaver, a neuropsychologist. Dr. Beaver also reviewed the medical and legal history of Dr. DeLalio. Based upon objective testing, Dr. Beaver diagnosed Dr. DeLalio as suffering from "COGNITIVE DYSFUNTION, NOT OTHERWISE SPECIFIED (RESIDUAL POST-CONCUSSIVE SYMPTOMS); MAJOR DEPRESSIVE DISORDER,

RECURRENT." It was the opinion of Dr. Beaver that Dr. DeLalio's

> impaired thinking skills from the brain injury and major depression . . . demonstrably impaired his perceptions and understanding of the reality of the situation. Specifically, that he was indeed interacting with a 'minor' and, as an adult that was wrong. Consequently, he was not able to fully appreciate the wrongfulness of his conduct.

Appendix to Brief on Appeal in the Tenth Circuit 29.

The State of Wyoming claimed that the fact that a psychosexual evaluation was prepared by a clinical psychologist, Dr. Denison, somehow demonstrates that the trial attorney was not ineffective. See Denison report in the Appendix to Brief on Appeal in the Tenth Circuit 42. In truth, the Denison evaluation was prepared after Tom Lee had convinced Dr. DeLalio that the post-concussive syndrome was not relevant and would not be helpful for the defense. Mr. Lee held this belief even though he had not done any independent investigation, failed to gather the medical and legal records and failed to have Dr. DeLalio examined by a qualified medical person. The evaluation was not prepared to determine the degree of the organic brain damage or to determine whether the cognitive deficits might have any application to the case. The evaluation was prepared as mitigation after a plea of guilty to the charges. Moreover, Dr. Denison was not qualified to render an opinion concerning the cognitive deficits. As Dr. Beaver put it in his

correspondence of August 21, 2008, Appendix to Brief on Appeal in the Tenth Circuit 40:

> In review of Dr. Denison's training and background I would note he lacked the training and expertise to address the issues I raised in my report of 03/28/08. Dr. Dension showed no specific training or experience in the evaluation of traumatic brain injuries and its effects on persons' mental status. He is not recognized by the main credentialing body of the American Psychological Associations as having expertise in clinical neuropsychology.
>
> In the report by Dr. Denison regarding his examination of George DeLalio, there is no evidence he completed *any* testing of Dr. DeLalio's cognitive abilities despite the defendant's history of a traumatic brain injury.
>
> It is clear in reviewing Dr. Denison's report of 01/06/06 that the focus of the evaluation was on George DeLalio's sexual behavior, sexual treatment needs and community risk. The focus of the exam was not specifically on George DeLalio's mental capacity at the time of the alleged offense. In fact no summary statement is made by Dr. Denison regarding his capacity to form the requisite intent on which he could fully appreciate the wrongfulness of his actions.

Even so, there was language in the Denison report which should have given pause to the trial lawyer, had he been paying attention, and required

further investigation. As Dr. Beaver pointed out in his correspondence, "Interestingly, in Dr. Denison's report there is mention of George DeLalio being 'vulnerable.' Also, at one point in the report Dr. Denison questions Dr. DeLalio's 'reality testing' but still does not formally address the issues raised in my neuropsychological evaluation report of 03/28/08." Appendix to Brief on Appeal in the Tenth Circuit 41. See also DeLalio affidavit filed in state court, paragraph 14, Appendix to Brief on Appeal in the Tenth Circuit 8.

The state district court granted summary judgment. The Wyoming Supreme Court refused to hear the case on appeal through a writ of review. A month and a half later, Dr. DeLalio filed his petition for writ of habeas corpus in federal court. The State of Wyoming responded by claiming that the petition was time barred by the one year statute of limitations in 28 U.S.C. § 2244(d)(1).

Dr. DeLalio responded to the State of Wyoming's motion to dismiss in federal court by stating that the State of Wyoming completely ignored the provisions of 28 U.S.C. § 2244(d)(1)(D), which provides that the statute does not begin to run until "the factual predicate of the claim or claims presented could have been discoverable through the exercise of due diligence." Dr. DeLalio is cognitively impaired and suffers from recurrent major depression. As Dr. DeLalio stated in his affidavit, he was entirely dependent on the advice of counsel. He was told that his brain injury had nothing to do with the case. His counsel made no effort to investigate Dr. DeLalio's mental condition. Mr. Lee did not even attempt to gather Dr. DeLalio's

medical records until after Dr. DeLalio had entered his plea. Given Dr. DeLalio's mental condition and his reliance on his counsel, Dr. DeLalio had no way of knowing that he had a potential absolute defense to the crime charged. Appendix to Brief on Appeal in the Tenth Circuit 78.

Dr. DeLalio originally contacted his current attorney concerning a change in his status as a probationer. The contact took place on November 27, 2007. He was "flabbergasted" when Mr. Goody suggested that he might have a defense to the alleged crime, based upon his brain injury. Indeed, neither Mr. Goody nor Dr. DeLalio knew that the defense existed until Dr. Beaver, the neuropsychologist, provided Dr. DeLalio and Mr. Goody with his final report on March 28, 2008. Therefore, under 28 U.S.C. § 2244(d)(1)(D), the one year statute of limitations did not begin to run until March 28, 2008. At the earliest, Dr. DeLalio did not have reason to know that he had a claim until he originally spoke, by phone, with Mr. Goody on November 27, 2007. The state post-conviction was filed on April 18, 2008. While the case was pending in state court, the statute was tolled. 28 U.S.C. § 2244(d)(2). The Wyoming Supreme Court refused to hear Dr. DeLalio's petition for writ of review on January 26, 2009. The federal petition was filed on March 10, 2009. Therefore, Dr. DeLalio believes that the federal petition for habeas corpus was filed well within the one year statute of limitations; in other words, within one year from "the date on which the factual predicate of the claim or claims

presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

After objective neuropsychological testing, Dr. Beaver found that Dr. DeLalio's "impaired thinking skills from the brain injury and major depression . . . demonstrably impaired his perceptions and understanding of the reality of the situation. Specifically, that he was indeed interacting with a 'minor' and, as an adult that was wrong. Consequently, he was not able to fully appreciate the wrongfulness of his conduct."

In Wyoming, W.S. § 7-11-301 provides a vehicle for an attorney to raise a mental health defense. A mental health defense is a complete defense. W.S. § 7-11-304 states that "A person is not responsible for criminal conduct if at the time of the criminal conduct, as a result of mental illness or deficiency, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." Despite the availability of a complete defense, Mr. Lee failed to investigate the available mental health evidence or have a neurologist or neuropsychologist examine Dr. DeLalio or raise the defense. Indeed, given the nature of the act and Dr. DeLalio's cognitive disabilities, it is not at all unlikely that all of the neurological experts would have agreed with Dr. Beaver. Dr. DeLalio is brain damaged; he suffers from a major psychiatric mental illness which is related to the brain injury, and his reality is distorted. If all of the experts agree, the case is over, for all practical purposes.

Surely, at a minimum, the attorney for Dr. DeLalio should have had Dr. DeLalio examined by a neurological expert. Had Mr. Lee acted as a competent criminal defense lawyer and not abandoned his client, a mental health plea would have been entered. In accordance with W.S. § 7-11-304, the court could have ordered a second evaluation before trial. We do not have to speculate about the results of the evaluation, because Dr. DeLalio has actually been examined by Dr. Beaver. Dr. Beaver concluded that Dr. DeLalio was not criminally responsible due to his organic brain damage.

Mr. Lee's representation of Dr. DeLalio, therefore, fell far below what is expected of any competent criminal defense attorney in violation of the 6th Amendment to the United States Constitution under *Strickland v. Washington,* 466 U.S. 668 (1984). The prejudice to the petitioner was devastating. By failing to enter the plea, by failing to investigate, by failing to discover that Dr. DeLalio was cognitively impaired and his reality was distorted, counsel deprived Dr. DeLalio of the only credible defense which was available to him. Had the defense been raised, particularly given the strength of the Beaver evaluation, there is a reasonable probability that Dr. DeLalio would have been found not guilty by reason of mental illness and deficiency, or, simply, not guilty.

> Given these circumstances, and considering the bizarre and disturbing nature of the case, as well as indications from [other experts] that [petitioner] suffered from severe mental problems, a failure to timely *investigate* a

> client's mental state, let alone a failure to *assert* a mental-state defense at trial, falls well below an objective standard of reasonableness.

"In a case where there was no issue beyond that of [petitioner's] mental state, [trial counsel's] performance deprived [petitioner] of any chance of convincing the jury that [petitioner] did not have the requisite mental state . . . " *McLuckie v. Abbott,* 337 F.3d 1193, 1199 (10th Cir. 2003). Emphasis in the original.

Since there has never been an evidentiary hearing on the merits of Dr. DeLalio's claims in post-conviction and federal habeas, the record is not fully developed. Nevertheless, Dr. DeLalio believes that the state district court determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court . . . " or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As the Circuit said in *Gibson v. Klinger,* 232 F.3d 799, 803 (10th Cir. 2000), "We only take a 'quick' look at the federal habeas petition to determine whether [petitioner] has 'facially allege[d] *the denial of a constitutional right.*'" A review of the state court decision indicates that the decision was "objectively unreasonable." The state district court based its decision, in large part, on the fact that counsel had Dr. DeLalio examined by Dr. Denison. The evaluation was conducted in connection with Dr. DeLalio's plea of guilty and is titled Forensic Psychosexual Evaluation. The purpose of the evaluation was

for mitigation of punishment, after a plea of guilty. The evaluation did not extend to any neurological deficits from which Dr. DeLalio suffered. Indeed, Dr. Denison did not have the qualifications to even express an opinion concerning the nature and extent of Dr. DeLalio's deficits because he was not a neuropsychologist or neurologist. Accordingly, Dr. Denison and, ultimately trial counsel, was not aware that Dr. DeLalio had a complete and absolute defense available to the crime charged in the information. The finding of the state district court, therefore, was objectively unreasonable under *Strickland* because there is a reasonable probability that the result of the prosecution might have been different had counsel effectively investigated Dr. DeLalio's mental state.

In the Tenth Circuit the one year statute of limitation for filing federal habeas petitions is not jurisdictional and is subject to equitable tolling, and equitable tolling includes an actual innocence claim. *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir. 1998); *Gibson v. Klinger,* 807. The one year time period begins to run in accordance with individual circumstances that could reasonably affect the availability of the remedy, but requires inmates to diligently pursue claims. *Miller,* id.; *Fisher v. Gibson,* 262 F.3d 1135, 1143 (10th Cir. 2001). In *Fisher,* 1145, the Court did not grant relief, observing "that Fisher does not contend his claimed due process violations have resulted in the erroneous conviction of an innocent man." Citing *Schlup v. Delo,* 513 U.S. 298, 323-329, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Miller,* id. Of course, Dr. DeLalio's position is actual innocence,

unlike the petitioner in *Fisher*. Dr. DeLalio believed, due, in part to his mental disability, that he was communicating on the Internet with an adult woman.

Despite the favorable law in the Tenth Circuit, the Circuit panel found that Dr. DeLalio knew of the claim, even though his attorney, Tom Lee, advised Dr. DeLalio that his brain injury would have nothing to do with his case. On the actual innocence issue, the court found the mental health defense did not suffice since the issue was not factual innocence. In other words, Dr. DeLalio did not allege that he had not committed the act. Rather, he alleged that the incident occurred, but he had a legal defense to the crime. On the contrary, Dr. DeLalio stated that he was factually innocent of the crime because he did not believe that he was dealing with a 13 year old girl; he was "role playing" with an adult female and just playing a game. Appendix to Brief on Appeal in the Tenth Circuit 51.

Dr. DeLalio is cognitively impaired and suffers from recurrent major depression. As Dr. DeLalio stated in his affidavit, he was entirely dependent on the advice of counsel. He was told that his brain injury had nothing to do with the case. His counsel made no effort to investigate Dr. DeLalio's mental condition. Mr. Lee did not even attempt to gather Dr. DeLalio's medical records until after Dr. DeLalio had entered his plea. Given Dr. DeLalio's mental condition and his reliance on his counsel, Dr. DeLalio had no way of knowing that he had an absolute defense to

the crime charged until he contacted Mr. Goody. We must remember that Dr. DeLalio was following the advice of counsel who was guilty of gross negligence and culpable neglect. Dr. DeLalio knew, of course, that he had suffered a brain injury. However, he was told by his lawyer that the brain injury had no application to his case. Given Dr. DeLalio's cognitive impairment what more could be expected of Dr. DeLalio? He is a layman, uneducated in the law. Members of the public at large hire lawyers because lawyers are specially trained to handle legal problems which require highly specialized knowledge. Any lay-person is going to follow the advice of counsel. After all, they are paying for the lawyer's services. This is even more certain in the situation of Dr. DeLalio, since he was cognitively impaired. If anything he was even more vulnerable to attorney negligence and neglect than a member of the general public who does not suffer from brain damage.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari, or, in the alternative, that the Court hold the petition in abeyance until *Holland v. Florida* is decided.

DATED this 16th day of April, 2010.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

GEORGE DELALIO, Petitioner-Appellant, v. STATE OF WYOMING, Respondent-Appellee.	No. 09-8093 (D.C. No. 2:09-CV-00052-ABJ) (D. Wyo.)

ORDER
DENYING CERTIFICATE OF APPEALABILITY

(Filed Jan. 29, 2010)

Before **KELLY, BRISCOE,** and **HOLMES,** Circuit Judges.

Petitioner-Appellant George DeLalio seeks a certificate of appealability ("COA") allowing him to appeal the denial of his petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. The district court dismissed the petition as untimely based on the one-year statute of limitations in 28 U.S.C. § 2244(d)(1). Because the factual basis for Mr. DeLalio's ineffective assistance of counsel claim could have been discovered through reasonable diligence and equitable tolling is not appropriate, we deny a COA and dismiss the appeal.

Mr. DeLalio pled guilty to attempted sexual exploitation of a child. Aplt. App. 60. The state district court entered its final judgment and sentence on October 13, 2006. Doc. 14 at 1. Mr. DeLalio received a sentence of two to four years in prison, but the court suspended that sentence in favor of five years of probation. *Id.* Mr. DeLalio did not file a direct appeal. *Id.* at 2. Mr. DeLalio filed a petition for post-conviction relief with the state district court on April 18, 2008. *Id.* The trial court granted the State's motion for summary judgment on January 12, 2009, and on February 24, 2009, the Wyoming Supreme Court denied the writ of review. *Id.*

Mr. DeLalio's federal habeas petition, filed March 16, 2009, claimed ineffective assistance of counsel as the basis for relief. Doc. 14 at 2. He alleged that his trial counsel failed to investigate and pursue a possible mental illness defense. *Id.* The district court denied the petition, finding the petition untimely and ineligible for either statutory or equitable tolling. *Id.* at 4-6. Mr. DeLalio seeks a COA, arguing that the one-year limitations period was tolled for two reasons: he could not have discovered the factual predicate of his ineffective assistance claim through the exercise of due diligence, and he is actually innocent. Pet. Br. at 12-15.

In order for this court to grant a COA, Mr. DeLalio must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court's denial of habeas relief is based on a procedural ground, Mr. DeLalio

must show that reasonable jurists would find it debatable (1) whether the district court was correct in its procedural ruling, and (2) whether the petition stated a valid claim of the denial of a constitutional right. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). If he cannot make a threshold showing on the procedural issue, we need not address the constitutional issues. *Id.* at 485.

The one-year limitations period for § 2254 petitions begins to run from the latest of four dates, two of which are relevant here: the date when the conviction becomes final, and "the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(A), (D). Mr. DeLalio argues that the limitations period was tolled until he learned of the factual predicate of his claim: that he may have had a complete legal defense under Wyoming law because a years-old brain injury so impaired his cognitive functions that he was unable to appreciate fully the wrongfulness of his crime. Pet. Br. at 10, 12. Mr. DeLalio claims that he could not have discovered his possible mental illness defense until a November 27, 2007 phone conversation with his present attorney "[a]t the earliest." *Id.* at 10. Therefore, his argument goes, the limitations period began running on that date (or possibly later, when he received a neuropsychological report on March 28, 2008), and was tolled again with the filing of his post-conviction action on April 18, 2008 until the Wyoming Supreme Court denied review on January 26, 2009. Pet. Br. at

10; *see* 28 U.S.C. § 2244(d)(2). Given the tolling for the state post-conviction claim, the difference between the two start dates is immaterial: even if the period began running November 27, 2007, the limitations period had not expired when Mr. DeLalio filed his federal habeas claim on March 10, 2009.

Mr. DeLalio alleges that he was "flabbergasted" to learn of his possible mental illness defense during the November 27, 2007 phone call with his attorney. Pet. Br. at 10. The record, however, indicates that Mr. DeLalio knew of the factual predicate to his ineffective assistance claim throughout his criminal trial. At the initial interview with his trial attorney, Mr. DeLalio raised the issue of his brain injury and its legal significance. Pet. App. at 7. Petitioner raised his brain injury as a mitigating factor "[n]umerous times" to his trial attorney. *Id.* at 10. Mr. DeLalio was ignorant only of the *legal* basis for his claim, which is insufficient to toll the statute of limitations. *See Ellis v. Jones,* 302 F. App'x 817, 819 (10th Cir. 2008). Therefore, the statute of limitations began to run when Mr. DeLalio's conviction became final: at the expiration of the period to file notice of direct appeal 30 days after entry of judgment, November 12, 2006. *See* 28 U.S.C. § 2244(d)(1)(A); Wyo. R. App. P. 2.01(a). The limitations period expired one year later, November 12, 2007. The petition for state post-conviction relief filed after the limitations period expired will not toll it. *See Clark v. Oklahoma,* 468 F.3d 711, 714 (10th Cir. 2006).

In passing, Mr. DeLalio argues that he is entitled to equitable tolling based on the "actual innocence" exception. Pet. Br. at 14-15. "A claim of actual innocence may toll the [habeas] statute of limitations." *Laurson v. Leyba,* 507 F.3d 1230, 1232 (10th Cir. 2007). Mr. DeLalio argues that he is *legally* innocent – that a valid legal defense existed based on cognitive impairment. Legal innocence does not suffice for an "actual innocence" claim because "[a]ctual innocence means 'factual innocence.'" *Id.* (quoting *Bousley v. United States,* 523 U.S. 614, 623 (1998)).

Because Mr. DeLalio filed his federal habeas claim more than one year after his conviction became final and he is not eligible for equitable tolling, reasonable jurists could not debate that the district court correctly dismissed the petition as untimely.

We DENY a COA and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

GEORGE DELALIO, Petitioner, vs. STATE OF WYOMING, Respondent.	Case No. 09-CV-52-J

ORDER DENYING CERTIFICATE OF APPEALABILITY

(Filed Nov. 18, 2009)

On November 10, 2009, Mr. DeLalio filed a notice of appeal in the above-entitled matter. On this same day he filed a motion for a certificate of appealability. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court must either issue a certificate of appealability indicating which issues satisfy the required showing, or must state the reasons why such a certificate should not issue. 28 U.S.C. §2253(c)(3); Fed.R.App.P. 22(b).

As explained in the Court's Order denying Mr. DeLalio's § 2254 Petition, equitable tolling is not warranted and the Petition is untimely. The Court finds

that Mr. DeLalio cannot make a substantial showing of the denial of a constitutional right and a certificate of appealability should not issue in this action.

NOW, THEREFORE, IT IS HEREBY ORDERED that Mr. DeLalio's motion for certificate of appealability is DENIED.

Dated this 18th day of November, 2009.

/s/ Alan B. Johnson
ALAN B. JOHNSON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

GEORGE DELALIO, Petitioner, vs. STATE OF WYOMING, Respondent.	Case No. 09-CV-52-J

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

(Filed Oct. 22, 2009)

The above-entitled matter came before the Court upon Mr. DeLalio's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court has reviewed the petition, Respondent's motion to dismiss, and the entire file, and finds that the petition should be DISMISSED.

BACKGROUND

On February 2, 2006, in the Wyoming District Court for the First Judicial District, Mr. DeLalio pleaded guilty to one count of Attempted Sexual Exploitation of Children. The trial court issued its judgment and sentence on October 13, 2006. The court imposed a sentence of two to four years, but

suspended that sentence in favor of a five year term of probation.

Mr. DeLalio did not appeal his conviction to the Wyoming Supreme Court. On April April [sic] 18, 2008, Mr. DeLalio filed a petition for post-conviction relief in the trial court. The trial court granted the State's motion for summary judgment on January 12, 2009. On January 26, 2009, Mr. DeLalio petitioned the Wyoming Supreme Court for a writ of review. The writ of review was denied on February 24, 2009.

Mr. DeLalio filed the instant petition on March 16, 2009. His petition states one claim: "Trial counsel failed to investigate and present exculpatory evidence in the trial court and failed to enter a not guilty by reason of mental illness plea." (Pet. at 3-7.)

ANALYSIS

Mr. DeLalio's petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA establishes a one-year limitations period for challenging a state-court conviction. *See* 28 U.S.C. § 2244(d). The one-year period begins to run from the date of one of four triggering events:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The most common triggering event is the date upon which the conviction became final, either after direct appeal or after the time for seeking an appeal has expired. The statute provides tolling (suspension) of the one-year period for all of "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). This is named "statutory tolling." If, after applying statutory tolling, a petitioner's petition is deemed untimely, a federal court can hear claims only if the petitioner can establish that "equitable tolling" should be applied. In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Court clarified

that, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Id.* at 418.

Mr. DeLalio's conviction was entered on October 13, 2006. Under WYO.R.APP.P. 2.01, Mr. DeLalio had thirty days to appeal his conviction to the Wyoming Supreme Court. He did not do so. Therefore, his conviction became final on November 12, 2006, when the time to file an appeal lapsed. Pursuant to 28 U.S.C. § 2244(d)(1)(A), Mr. DeLalio's one year period to file his federal habeas petition ended on November 12, 2007. Mr. DeLalio filed his petition with the Court on March 16, 2009, thus absent statutory or equitable tolling, Mr. DeLalio's petition must be denied as time-barred.

Statutory Tolling

First, Mr. DeLalio is unable to secure statutory tolling under § 2244(d)(2). Mr. DeLalio filed his state post-conviction petition on April 18, 2008. The one-year limitations period expired on November 12, 2007. Because the one-year limitations period expired before he filed for state post-conviction relief, statutory tolling under § 2244(d)(2) is unavailable. *See Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007); *Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001).

Second, Mr. DeLalio cannot succeed on the claim that under § 2244(d)(1)(D), the one-year limitations period did not begin until March 28, 2008, when he received a report from Dr. Beaver that he claims would have supported a mental health defense at trial. (Pet.'s Response to Mtn. Dismiss at 4.) Mr. DeLalio explains that:

> [He] contacted the undersigned concerning a change in his status as a probationer. The original contact took place on November 27, 2007. He was "flabbergasted" when Mr. Goody suggested that he might have a defense to the alleged crime, based upon his brain injury. Indeed, neither Mr. Goody nor Dr. DeLalio knew that the defense existed until Dr. Beaver, the neuropsychologist, provided Dr. DeLalio and Mr. Goody with his final report on March 28, 2008.

Id.

Under § 2244(d)(1)(D), the one-year period begins to run from the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. Specifically, under § 2244(d)(1)(D), the limitations period "begins when the prisoner knew (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." *Hasan v. Galaza*, 254 F.3d 1150, 1154 n. 3 (9th Cir. 2001). Mr. DeLalio knew of his head injury before he pleaded guilty. In fact, he informed his trial counsel at the beginning of his case that he suffered a concussion.

(Pet. Resp. to Mtn. Dismiss at 2; Delalio [sic] Affidavit at 4.) Because the record shows that Mr. DeLalio was aware of the factual predicate of the claim even before he entered his guilty plea, Dr. Beaver's report does not re-start the statute of limitations.

Equitable Tolling and Actual Innocence

Finally, Mr. DeLalio asserts that equitable tolling is appropriate as he is actually innocent. (Pet.'s Resp. to Mtn. Dismiss at 5.) In support of this claim, Mr. DeLalio points to the findings of Dr. Beaver who stated that Mr. DeLalio was "not able to fully appreciate the wrongfulness of his conduct." *Id.*

A petitioner may claim actual innocence for the purposes of equitable tolling, even if his conviction was the result of a plea. *Bousley v. United States*, 523 U.S. 614, 623 (1998). The United States Supreme Court has held that if a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). The threshold inquiry is whether "new facts raise [] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of trial." *Id.* at 317. In order to establish actual innocence, the petitioner "must show that it is more likely than not that no reasonable juror would have

found petitioner guilty beyond a reasonable doubt." *Id.* at 327. Importantly, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. The Supreme Court has cautioned that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Schlup*, 513 U.S. at 321.

Mr. DeLalio's claim fails because he asserts only legal innocence, not factual innocence. *See Ellis v. Hargett*, 302 F.3d 1182, 1186 n.1 (10th Cir. 2002). He contends that his head injury rendered him unable to "fully appreciate the wrongfulness of his conduct." (Pet.'s Resp. to Mtn. Dismiss at 5.) Mr. DeLalio does not assert that he did not commit the conduct leading to conviction. Accordingly, his claim is insufficient as a matter of law to avoid the procedural bar. *See Laurson v. Leyba*, 507 F.3d 1230, 1233 (10th Cir. 2007).

CONCLUSION

For the reasons stated herein, the Court finds that Mr. DeLalio's petition should be dismissed as time-barred.

NOW, THEREFORE, IT IS HEREBY ORDERED that Mr. DeLalio's petition for writ of habeas corpus is **DISMISSED**, with prejudice, as time-barred. It is

FURTHER ORDERED that all pending motions are **DENIED** as **MOOT**.

Dated this 21st day of October, 2009.

/s/ Alan B. Johnson
ALAN B. JOHNSON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

GEORGE DELALIO, Petitioner, vs. STATE OF WYOMING, Respondent.	Case No. 09-CV-52-J

JUDGMENT

(Filed Oct. 22, 2009)

This matter came before the Court upon a petition for a writ of habeas corpus. This Court reviewed the petition and all the materials in the file, and entered an order dismissing the petition as time-barred.

NOW THEREFORE, IT IS HEREBY ORDERED AID ADJUDGED that petition for habeas corpus is DISMISSED.

Dated this 21st day of October, 2009.

/s/ Alan B. Johnson
ALAN B. JOHNSON
UNITED STATES
DISTRICT JUDGE